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Notes, Comments, Digests

NOTES, COMMENTS AND DIGESTS

THE LIABILITY OF THE AIRCRAFT OPERATOR FOR INJURY TO THE MAN ON THE GROUND OR DAMAGE TO HIS PROPERTY.*

Although aircraft operators have been held liable for damage caused as a result of forced landings or crashes in all reported cases to date, the legal theory used in predicating this liability is by no means definitely settled.[1] In *Kadylak* v. *O'Brien*,[2] the most recent case in which this problem has arisen, the defendant was held accountable for damages in a jurisdiction having a statutory provision which states that liability for injuries to persons and damage to property on the ground occasioned by the descent of airplanes shall be determined by the law applicable to torts on land.[3]

The accident giving rise to the litigation occurred when the rudder control wire on the defendant's plane broke causing a forced landing. In executing the landing, the defendant struck and killed the plaintiff's minor son, who was swimming in the small country creek in which the defendant landed. The plaintiff received a verdict for $6,500[4] and the defendant moved for a new trial, claiming that there had been no finding of the negligence necessary to establish liability under the statute.

Although the reported opinion of the District Court is not definite in giving grounds for denying the motion, liability has been based on any one of several doctrines in similar situations. It is immediately evident that the controlling statute[5] negates the possibility of using the concept of absolute liability which could be established in some jurisdictions under statute[6] or by classifying aviation as an ultra-hazardous activity.[7] Therefore, in order to

*Kadylak v O'Brien, U.S.D.C., W.D. Pa., Jan. 14, 1941.

1. On June 1, 1941, the Civil Aeronautics Board released a report in which the entire problem of avaition liability was reviewed and analyzed. The report, which was prepared under the supervision of Edw. C. Sweeney, member of the Board's general counsel and former associate editor of the Journal of Air Law and Commerce, has not been adopted by the Board as yet but has been released in order to draw critical comments. While it covers all types of liability, references will be made here only to that portion of it concerning the aircraft operator's liability to the man on the ground, his personal property and real estate.

2. U.S.D.C., W.D. Pa., Jan. 14, 1941.

3. Pa. Stat. Ann: (Purdon, Supp. 1940) T.2, §1469: "The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of the Commonwealth, shall be liable for injuries or damage to persons or property on or over the land or water beneath, caused by ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applying to torts in this Commonwealth." Two other states have similar statutes: Arizona, Code (1939) §48-111; Idaho, Code Ann. (1932) §21-105.

4. Since the only services which would have been rendered in the future by the deceased boy were such as ordinarily are expected from one of several minor sons on a small farm, the District Court thought the verdict was excessive and reduced the amount awarded to $3,000.

5. See note 3 *supra*.

6. §4 of the Uniform State Law for Aeronautics of 1922, in effect in 17 states, provides that the landing of an aircraft on the lands of another, without his consent, is unlawful except in case of a "forced landing" and that in such case the owner of the aircraft is absolutely liable for the damages so caused.

7. §519 of the Restatement of Torts states that one who carries on an ultra-hazardous activity is liable to another harmed by the unpreventable miscarriage of this activity although the utmost care is exercised to prevent that

have taken the accident out of the category of accidental intrusions[8] and establish liability the court must have found that the accident was due to the negligence of the defendant.

Apparently there is ample evidence to uphold a finding based on specific allegations of negligence. The court mentions that "there was some testimony to the effect that the cable was frayed at the point of breakage from which some inference may be drawn of a lack of proper inspection." The Civil Air Regulations require periodical checks of aircraft and it is very doubtful that a cable would become frayed to the breaking point between those checks. Moreover, although the opinion does not set forth all of the conditions existing at the time and place of the accident, it seems that the defendant was negligent in the execution of the landing itself. Only the rudder was out of control; the plane could be elevated, lowered, and even banked, at will. Under these circumstances the pilot was under a duty to land in a safe place so that no innocent third person would be injured. The instant case presents a comparatively minor mechanical failure and one that gave the pilot sufficient time to plan a safe landing. His failure to do so might very well be considered the negligence required to establish liability.

Since no specific acts of negligence were alleged it may be assumed that the plantiff relied on the rule of *res ipsa loquitur*. This is borne out by the language used by the court in stating that "the present case is of that class in which the instrumentality that produced the injury was under the control and management of the defendants, and the accident was such as does not happen if due care has been used. The accident having occurred under such circumstances, the burden was on the defendants to establish their freedom from fault in operating a dangerous agency." The rule has been applied in similar cases[9] where the suits have been based on negligence as distinct from other theories of liability.[10] Whatever the tools used, it is clear that, as in the previous cases in this field, the court was not hard pressed to reach the desired result.

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harm. In discussing clause (a) of §520 which defines an ultra-hazardous activity as one which "necessarily involves a risk of serious harm to the person, land, or chattel of others which cannot be eliminated by the exercise of the utmost care," it is said: "An activity may be ultra-hazardous because of the instrumentality which is used in carrying it on, the nature of the subject matter with which it deals, or the condition which it creates. Thus, aviation in its present stage of development is ultra-hazardous because even the best constructed and maintained airplane is so incapable of complete control that flying creates a risk that the plane even though carefully constructed, maintained, and operated may crash to the injury of persons, structures, and chattels on the land over which the flying is made."

8. §166 of the Restatement of Torts, vol. 1, p. 394, entitled "Non-Liability for accidental intrusions" reads as follows: "Except when the actor is engaged in an extra-hazardous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest."

9. Genero v. Ewing, 176 Wash. 78, 28 P (2d) 116, 1934 U. S. Av. R. 11 (1934) (plaintiff's hangar and airplane damaged when the defendant's plane escaped while being cranked without a pilot at the controls and without blocks under the wheels); Rochester G. & E. Corp. v. Dunlop, 148 Misc. 849, 266 N. Y. S. 469, 1933 U. S. Av. R. 511 (1933) (defendant's plane crashed into plaintiff's transmission line tower while making a forced landing at night).

10. As a result of the different interpretations given the res ipsa loquitur rule by the various courts attempts are being made, the most recent of which is embodied in the C.A.B. Report, to create uniformity in the disposition of these cases by providing for limited absolute liability. The C.A.B. Report proposes that this be done by the passage of a complete Federal Aviation Liability Act. A similar solution is contained in the Uniform Aviation Liability Act which provides for adoption and administraton by each state.

DUTY OF CARE REQUIRED OF PILOT OPERATING ON A CONTROLLED AIRPORT*

In *Finfera v. Thomas, et al*[1], the plaintiff landed an Aeronca airplane at the Detroit City Airport, Michigan, without receiving any signals from the traffic control tower. Assuming there were no other airplanes nearby, and still receiving no signal from the control tower, the plaintiff began taxiing. He moved onto a runway where a Stinson airplane, being taxied out from the hangar by the defendant, Roland Thomas, collided with and damaged the Aeronca airplane and injured the plaintiff. The plaintiff contends that Thomas was negligent, and that the control tower, upon which he asserted he was relying, was negligent in not warning him of the immediate danger. The District Court found the plaintiff guilty of contributory negligence of such character as to preclude recovery and directed a verdict for the defendants which was affirmed by the Court of Appeals.

One court has said[2] that "the degree of standard of care required of an aviator is regulated by the familiar common law principles of negligence. Already many of the states have adopted a uniform law providing that the liability of the owner of one aircraft to the owner of another, or the aeronaut or passengers on either aircraft, for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.[3] And, as the common law requires ordinary care in such cases, the degree of care required of an aviator not carrying passengers for hire is ordinary care;[4] that is, that degree of care which the great mass of men, or an ordinary prudent person would use under the same or similar circumstances. He is not required to exercise the highest degree of care,[5] although the care which he may be called upon to exercise in the particular instance may be very high under the circumstances."

The proper concept of traffic control is to provide constant attention to all traffic problems.[6] The purpose of the control tower is to signal the pilot when

*Finfera v. Thomas et al., 119 F. (2d) 28 (C.C.A. 6th, 1941)

1. 119 F. (2d) 28 (C.C.A. 6th, 1941)

2. Greunke v. North American Airways, 201 Wis. 565, 230 N.W. 618, 1930 U. S. Av. R. 126, 1 Journal of Air Law 363 (1930).

3. Uniform State Law for Aeronautics (1922), §6. 1936 U. S. Av. R. 376. See also Uniform Aeronautical Code, draft, 1931, §§7 and 8. 1931 U. S. Av. R. 274, 2 Journal of Air Law 552 (1931). The following states have adopted §6 of the Uniform State Law for Aeronautics (1922): Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, and Wisconsin.

4. In the absence of statute, liability has been predicated upon negligence and the standard used has been that of ordinary care in the following collision-of-aircraft cases: Tiedt v. Gibbons, 1940 U. S. Av. R. 63 (Cir. Ct. Cook Co. Ill, 1937); Parker v. Granger, 39 P. (2d) 833 (Cal. App. 1934) aff'd 4 Cal. (2d) 668, 52 P. 2d) 226, 1936 U. S. Av. R. 251 (1935) cert. den'd 298 U. S. 644, 1937 U. S. Av. R. 172 (1936); Read v. New York City Airport, Inc., 145 Misc. 294, 259 N. Y. S. 245, 1933 U. S. Av. R. 31 (1932); Bird v. Louer, 272 Ill. App. 522, 1934 U. S. Av. R. 188 (1933); Ebrite v. Crawford & O'Donnell, 5 P. (2d) 686 (Cal. App. 1931), aff'd 215 Cal. 724, 12 P. (2d) 937, 1932 U. S. Av. R. 9 (1932); Herrick v. Curtiss Flying Service, Inc., 1932 U. S. Av. R. 110 (Nassau Co., N. Y. 1932).

5. The charge that "it is the duty of every pilot operating an airplane *to exercise the highest degree of care* that men of reasonable vigilance and foresight ordinarily exercise in the practical conduct and operation of an airplane in making a landing on a runway at an airport under the same or similar circumstances, having regard to the law regulating the operation of the airplane in making a landing when landing at an airport" is erroneous and prejudicial and constitutes reversible error. Greunke v. North American Airways, *supra*, note 2. (Italics supplied.)

6. See Fred L. Smith, "Traffic Control on the Active but Non-Airline Airport." 11 Journal of Air Law and Commerce 67 (1940).

to take off and when to land; to warn the pilot of any obstacles on the field and of movements of other taxiing airplanes; to inform incoming pilots where to taxi for service. But such assistance does not relieve the pilot of all responsibility.[7] In attempting to handle all traffic expeditiously, a control tower must often allow pilots to exercise their discretion under the circumstances. If they are not occupied with more pressing duties, control tower operators will regulate ground traffic as a matter of accommodation. In the instant case the plaintiff was flying about a comparatively busy airport, an airport where the amount of traffic can be considerable, and where a pilot must not rely, after landing, on a control tower that may be occupied handling that traffic. The absence of a signal from the control tower is not to be construed as negligence, but rather as an indication that the tower was concerned with some other traffic problem. As soon as he realized that the control tower was not signaling him, the plaintiff should have been even more alert to ascertain if there were other planes moving on the airport. Having an unobstructed view, he, admittedly, could have seen the defendant's airplane by looking out to his left. His negligence in failing to do so contributed to the cause of the accident.[8]

A further problem raised by this case is the liability of the municipality. The control tower was part of the airport which was maintained by the municipality. Some states, by statute, have declared airports to be *governmental* functions,[9] and, therefore, not liable for their torts. But in many states the courts have said that the maintenance of an airport is a *proprietary* function, and as such render the municipality liable in the same manner as any other individual for damages and injuries caused by its negligence.[10] However, even though the view may be taken that the operation of an airport is a proprietary function, it does not appear that the city had violated its duty to the plaintiff in the instant case.

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7. Moreover, the city had posted a notice on the bulletin board at the airport which, among other things, stated that "the green or white light shall in no instance relieve the pilot from exercising due care and diligence in observing and avoiding other planes in the air or on the ground." Although not definitely stated in the case, this board was probably the same as those usually found in airports containing the daily weather maps and the Weekly Notices to Airmen, sent out by the C.A.A. If so, the plaintiff was responsible for all information contained thereon.

8. In Tiedt v. Gibbons, *supra*, note 4, the court said, "In the operation of an automobile a driver is negligent as a matter of law if he proceeds at a time when he is unable to see because his vision is obscured and he is further negligent as a matter of law if he fails to see an object which is in full view or which he would have seen had he looked," and applied this same reasoning to the operation of aircraft.

9. §2 of the Uniform Airports Act, draft, (1931) 1931 U. S. Av. R. 275, 2 Journal of Air Law 555 (1931), adopted by the National Conference of Commissioners on Uniform Laws and the American Bar Association in 1935; it has been incorporated into statute by several states. See 3 William's Tenn. Code Ann. (1934) 96, §2726.22 (Laws of 1933, C. 116, §1) 1933 U. S. Av. R. 502. Upheld in Stocker v. Nashville, 174 Tenn. 483, 126 S.W. (2d) 339, 1939 U. S. Av. R. 42, 10 Journal of Air Law and Commerce 422 (1939).

10. Pignet v. City of Santa Monica, 84 P. (2d) 166 (Cal. App. 1938); Christopher v. City of El Paso, 98 S.W. (2d) 394, (Tex. Civ. App. 1936); City of Blackwell v. Lee, 178 Okla. 338, 62 P. (2d) 1219 (1936); Mollencop v. City of Salem, 139 Ore. 137, 8 P. (2d) 733 (1932), commented on in 3 Journal of Air Law 467 (1932); Coleman v. City of Oakland, 110 Cal. App. 715, 295 Pac. 59 (1930); City of Mobile v. Latigue, 23 Ala. App. 479, 127 So. 257 (1930), commented on in 1 Journal of Air Law 365 (1930). But see comment in 120 A.L.R. 1376, 1378, discussing municipal immunity from liability for torts; the South Carolina court observes that "in endeavoring to put into practical effect the supposed distinction between public function and private business or enterprise of municipal corporations, it will hardly be doubted that the courts will find themselves involved in a maze of shadowy distinctions," hence rejects the distinction altogether, holding that all functions of municipal corporations are public or governmental in nature, in the exercise of which they are not liable. Irvine v. Greenwood, 89 S. C. 511, 72 S.E. 228 (1911).

The very fact that the court directed a verdict for the defendant indicates that, after weighing the evidence, it must have found, first, that the tower had not violated its duty in failing to give constant attention to the plaintiff, and, second, that the plaintiff by ignoring even the simple rules of ordinary care under the circumstances, had lost any cause of action he might otherwise have had as a result of the defendant's negligence. The plaintiff was not justified in assuming that the control tower would constantly warn him of all danger. The mere fact that a pilot is flying from a controlled airport does not mean that he is thereby relieved from the duty of exercising a reasonable degree of care.

An easier solution to the problem raised in the case under discussion might be found in the use of the comparative negligence doctrine, which is written into the Uniform Aviation Liability Act.[11] However, that doctrine does not apply in the present case, for Michigan had not adopted the Uniform Aviation Liability Act, and the courts of Michigan do not adhere to the doctrine of comparative negligence.[12]

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11. Art. V, §504. May be seen in 9 Journal of Air Law 737 (1938).
12. Injured person is without recourse where neither party exercised due care; comparative negligence rule not recognized. Johnson v. Grand Trunk Western R. Co., 246 Mich. 52, 224 N.W. 448 (1929). Comparative degrees of negligence are recognized by Wisconsin, Stat. (1939) §331.045 and Nebraska, Com. Stat. (1929) §20-1151.